93-792

No. 93-——

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

SILVEY REFRIGERATED CARRIERS, INC.,
Petitioner,

v.

H.J. HEINZ COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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November 18, 1993

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QUESTION PRESENTED FOR REVIEW

In an action by a motor common carrier to collect its tariff charges may the Interstate Commerce Commission declare the carrier's filed distance rate tariff retroactively void solely because the carrier failed to comply with ICC regulations for the determination of distances?

LIST OF PARTIES

Petitioner, Silvey Refrigerated Express (hereinafter "Silvey") is an Iowa corporation previously engaged in common carrier transportation of freight in interstate commerce. Respondent, H.J. Heinz Company (hereinafter "Heinz"), is a Pennsylvania corporation engaged in food manufacturing.*

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* There are no parent or subsidiary companies to be listed for the corporations named in this list of parties.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is unreported and reprinted at Appendix A. The order and decision of the United States District Court for the Western District of Pennsylvania (Diamond, J.) granting summary judgment for Heinz, is unreported and is reprinted at Appendix B. The report of Magistrate Lancaster adopted by the district court is reprinted at Appendix C.

JURISDICTIONAL BASIS

The judgment of the United States Court of Appeals for the Third Circuit was dated, filed and entered on August 23, 1993. This Court has jurisdiction under 28

U.S.C. § 1254(1). The petition herein was timely filed pursuant to 28 U.S.C. § 2101(c).

STATUTES INVOLVED

49 U.S.C. § 10761. Transportation prohibited without tariff.

> Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff.

49 U.S.C. § 10762. General tariff requirements.

* * * *

> (e) The Commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section.

STATEMENT OF THE CASE

Petitioner Silvey Refrigerated Carriers, Inc. (hereinafter "Silvey") was a motor common carrier operating pursuant to a certificate of public convenience and necessity issued by the Interstate Commerce Commission (hereinafter "ICC" or "Commission"). Silvey operated under Title 49 of the United States Code which governs transportation in interstate commerce.

Pursuant to 49 U.S.C. § 10762(a) Silvey published a tariff containing rates, *inter alia*, stated in cents per mile and filed with the ICC. The filed tariff specified that a distance guide published by Household Goods Carriers Tariff Bureau and filed with the ICC was to be utilized for a determination of distances. Silvey failed to follow ICC regulations set forth at 49 C.F.R. § 1312.4(d) re-

quiring it to provide the publisher of the distance guide with a current power of attorney at the time of the shipments at issue in this case. Silvey brought a civil action against H.J. Heinz Company ("Heinz") to collect freight charges based upon this filed tariff.

On January 23, 1993, the United States District Court for the Western District of Pennsylvania entered summary judgment in favor of Heinz and against Silvey by adopting the report filed by the magistrate. On August 23, 1993 the Third Circuit Court of Appeals affirmed the district court findings and cited *Security Services, Inc. v. K-Mart Corp.*, No. 92-1833 (3d Cir. June 18, 1993) as the compelling Circuit precedent for the affirmance.

REASONS FOR GRANTING THE WRIT

THIS COURT'S GRANT OF CERTIORARI IN *K-MART*, THE DECISION RELIED ON HEREIN, REQUIRES THAT THIS PETITION BE GRANTED.

On October 18, 1993, this Court granted the petition for writ of certiorari in *Security Services, Inc. v. K-Mart Corp.*, 996 F.2d 1516 (3d Cir. 1993), *cert. granted*, 1993 W.L. 345661, 61 U.S.L.W. 3165 (Oct. 18, 1993). As previously stated, the Third Circuit Court of Appeals opinion in this matter affirmed the district court and advised the parties to see the Circuit's recent *K-Mart* decision. Silvey requests that this Court grant its petition, as the decision in *K-Mart* will be controlling precedent. Silvey also requests that this Court hold this petition pending the outcome of the *K-Mart* case.

CONCLUSION

For the foregoing reasons, the Petition of Silvey should be granted and a Writ of Certiorari issued to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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November 18, 1993

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-3059

SILVEY REFRIGERATED CARRIERS, INC.,
Appellant

v.

H. J. HEINZ COMPANY

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 91-00393)
District Judge: Hon. Gustave Diamond

Submitted Pursuant to Third Circuit LAR 34.1(a)
August 12, 1993

Before: SCIRICA, COWEN and SEITZ,
Circuit Judges

JUDGMENT ORDER

After considering the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court entered January 29, 1993, be and is hereby affirmed. *See Security Services v. K-Mart Corp.*, No. 92-1833 (June 18, 1993, 3d Cir.). Costs taxed against appellant.

ATTEST:

/s/ P. Douglas Sisk
P. DOUGLAS SISK
Clerk

Dated: Aug. 23, 1993

By the Court,

/s/ Robert E. Cowen
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 91-393

SILVEY REFRIGERATED CARRIERS, INC.,
Plaintiff,

v.

H. J. HEINZ COMPANY,
Defendant.

MEMORANDUM ORDER

This action was referred to United States Magistrate Judge Gary L. Lancaster in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1), and Rules 3 and 4 of the Local Rules for Magistrates. The Magistrate Judge filed his Report, which concluded that defendant's motion for summary judgment should be granted. Plaintiff filed timely objections to the Report. After *de novo* review of the pleadings and documents in the case, together with the Magistrate Judge's Report and objections thereto, the following ORDER is entered this 27th day of January, 1993:

Defendant's motion for summary judgment is granted.

The Report filed by Magistrate Judge Lancaster is adopted as the Opinion of the Court.

/s/ Gustave Diamond

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 91-393

SILVEY REFRIGERATED CARRIERS, INC.,
Plaintiff,

v.

H. J. HEINZ COMPANY,
Defendant.

REPORT

GARY L. LANCASTER,
United States Magistrate Judge

This is an action under the provisions of the Interstate Commerce Act, 49 U.S.C. §§ 10741(a), 10761, and 10762. Plaintiff, a common carrier for hire, alleges that it is due unpaid freight bills from defendant, one of its customers. The parties have filed cross motions for summary judgment. There are no genuine issues of material fact and the matter is ripe for adjudication. For the reasons set forth herein, judgment should be entered in favor of defendant and against plaintiff.

I. BACKGROUND

Plaintiff is a motor common carrier for hire operating in interstate commerce and subject to the provisions of the Interstate Commerce Act. By petition filed April 6, 1989 with the United States Bankruptcy Court for the District of Nebraska, plaintiff sought a reorganization

with its creditors pursuant to Chapter 11 of the United States Bankruptcy Code. On January 29, 1991, the bankruptcy court entered an order directing Freight Audit and Collection, Division of Norcross, Inc. ("FAAC") to conduct an audit of plaintiff's freight bills for the purpose of determining whether the freight bills were properly billed according to the tariffs filed by plaintiff with the ICC and various state regulatory agencies. As part of this audit, FAAC audited all of the shipments made by plaintiff for defendant. The result of the audit was a determination that plaintiff had undercharged plaintiff $22,397.99. There is no question that defendant paid in full the original invoices plaintiff submitted to it. However, this action is based on the auditor's assertion that the original invoices were based on a mileage rate that was less than the mileage rate set forth in plaintiff's filed tariff. Plaintiff made timely demand on defendant for payment who has refused; hence this suit.

II. DISCUSSION

The ICC requires that all motor common carriers publish and file tariffs containing their transportation rates. 49 U.S.C. § 10761(a). Plaintiff correctly argues that a common carrier must charge and receive the amount set forth in its tariffs on file with the ICC. Specifically, under § 10761(a), a "carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff." *Id.* Plaintiff argues and the applicable case law confirms that once a rate is filed with the ICC by the carrier, both the carrier and the shipper are bound by the filed rate. *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939). This is known as the "filed rate" doctrine.[1]

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[1] The "filed rate doctrine" requires that only a tariff duly filed with the ICC can govern the billing of shipments by common carriers. The rate, however, must be reasonable. The filed rate doctrine seeks to avoid secret rates negotiated between shippers

Based on the foregoing legal framework, plaintiff asserts that defendant is liable for the undercharges as a matter of law. However, in order for plaintiff to prevail on a claim of undercharges under a filed tariff, it carries the burden of proof that the tariff relied upon is valid. *Carriers Traffic Service, Inc. v. Toastmaster, Inc.*, 707 F. Supp. 1498 (N.D. Ill. 1988). Instantly, defendant asserts that plaintiff's filed tariff rates are void and, as a matter of law, incapable of supporting plaintiff's undercharge claim.

Reduced to the essence, a mileage rate is established by multiplying the rate per mile by the distance between the origin and destination. 49 C.F.R. § 1312.30. The regulations further state that carriers like plaintiff have three alternative methods of establishing distances between the origin and destination: 1) publishing the distances between all locations covered by the distance rates in the same tariff; 2) referring to a map attached to the same tariff; or 3) referring to a separately filed distance guide tariff. 49 C.F.R. § 1312.30(c)(1).

Plaintiff chose the third method and plaintiff's tariffs specifically state that its rates are governed by the distances set forth in the Mileage Guide published by the Household Goods Carriers Bureau ("HGCB").[2] The HGCB is one of several national and regional agents or brokers for carriers and the names of those carriers participating in the HGCB are listed in separate tariffs published by HGCB. Thus, the distance charges can be calculated under plaintiff's filed tariff by referring to the HGCB Mileage Guide.

This might have been all well and good except that plaintiff is not a participant in the HGCB and the ICC

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and carriers. *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990).

[2] The full title of the document is "Household Goods Carriage Bureau MF-ICC 100—A Mileage Guide."

regulations require carriers like plaintiff who use the third method, to actually participate in the separate governing tariff. 49 C.F.R. § 1312.27(e). A carrier participates in a tariff filed by another carrier or agent by issuing a concurrence or power of attorney. 49 C.F.R. § 1312.4(d). The regulations clearly state that "[a]bsent effective concurrence or power of attorney, its tariff is void as a matter of law." *Id.* Thus, plaintiff's failure to participate in the tariff of HGCB, in accordance with ICC regulations, precludes plaintiff's reference to that tariff in its own filed tariff. Plaintiff therefore cannot rely on its invalid tariff to claim that the rates which were previously charged to defendant represented undercharges.

A recent decision by the ICC, *Jasper Wyman & Son, et al.—Petition for Declaration Order—Certain Rates and Practices of Overland Express,* 8 I.C.C.2d 246 (Jan. 30, 1992) considered the identical mileage rate issue and supports our conclusion. There, Overland Express alleged that Jasper Wyman owed it money for undercharges representing the difference between the filed mileage rate and a lower rate originally invoiced. Like plaintiff here, Overland's tariff rate, filed with the ICC, simply referred to the HGCB Mileage Guide to establish the distances used in the shipments. *Id.* at 248. Also like plaintiff here, the carrier did not participate in the HGCB because there was no effective concurrence or power of attorney. *Id.* at 247. Accordingly, the ICC found that the carrier's tariff was "not effectively on file" and therefore void. *Id.* at 256. In conclusion, the ICC held that because there was no effective occurrence or power of attorney pursuant to § 1312.4(d), "the mileage rate tariffs of [carrier] failed to provide the means for calculating freight charges, and may not serve as the basis for the undercharges." *Id.* at 263.

Judicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well-settled principle of federal law. Recently the Court

of Appeals of the 5th Circuit has addressed this issue and concludued that the ICC interpretation is reasonable. *Freightcor Services, Inc. v. Vitro Packaging Inc.*, 969 F.2d 1563 (5th Cir. 1992). Likewise, this Court concludes that the ICC's interpretation in *Jaspar Wyman & Son* is reasonable and, therefore, adopts the ICC's reasoning and analysis.[3]

III. CONCLUSION

Because it is undisputed that plaintiff did not participate in the HGCB by executing a concurrence or power of attorney pursuant to the relevant regulations, this Court finds that plaintiff did not participate in the HGCB Mileague Guide as required by the regulations. Plaintiff's failure to participate means that its tariffs were not properly on file with the ICC at the time the shipments occurred. Thus, the tariffs were void as a matter of law and can not be enforced here. Summary judgment should enter in favor of defendant and against plaintiff.

/s/ [Illegible]
United States Magistrate Judge

Dated: December 4, 1992

cc: All Counsel of Record

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[3] Defendant's supplemental brief refers to several more unpublished opinions which have reached the same result.

No. 93-792

In The

Supreme Court of the United States

October Term

SILVEY REFRIGERATED CARRIERS, INC.,

Petitioner,

v.

H.J. HEINZ COMPANY,

Respondent.

On Petition for Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where a carrier's participation in the Household Goods Carriers' Bureau Mileage Guide Tariff was cancelled, is the carrier's continued use of that tariff a violation of the filed rate doctrine?

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RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, the decision of the United States District Court for the Western District of Pennsylvania, and the Magistrate's Report all appear as Appendices in the Petition for Certiorari.

STATEMENT OF THE CASE

This case involves an undercharge action filed by Silvey Refrigerated Carriers, Inc. (hereinafter "Silvey")

against Respondent ("H.J. Heinz"). Upon cross motions for summary judgment, the District Court for the Western District of Pennsylvania referred the issue to the United States Magistrate. The Magistrate held that the tariffs upon which Silvey based its undercharge claim referred to the Household Goods Carriers' Bureau ("HGB") Mileage Guide Tariff for distances. However, since Silvey did not execute a power of attorney to participate in the HGB, the Magistrate held that Silvey's tariff was void as a matter of law relying on *Jasper Wyman & Son, et al. – Petition for Declaratory Order – Certain Rates and Practices of Overland Express, Inc.*, No. 40510, 8 I.C.C.2d 246 (1992) and *Freightcor Services, Inc. v. Vitro Packaging, Inc.*, No. 91-1507 (5th Cir. June 26, 1992), *withdrawn and op. replaced on reh'g*, 969 F.2d 1563 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 979 (1993). The District Court affirmed the Magistrate's Report and entered summary judgment for H.J. Heinz on January 27, 1993. The Third Circuit Court of Appeals affirmed the District Court based on its earlier opinion in *Security Services, Inc. v. K Mart Corporation*, No. 92-1833, subsequently reported at 996 F.2d 1516 (3rd Cir. 1993). The Third Circuit entered judgment on August 23, 1993.

REASONS FOR GRANTING THE WRIT

The Issue Herein Is Identical To The Issue In *Security Services v. K MART*

This Court's recent acceptance of *Security Services, Inc v. K Mart* presents the same issue and will be dispositive of the case at bar. *Security Services, Inc v. K Mart*, 996 F.2d 1516 (3rd Cir. 1993), *cert. granted*, 62 U.S.L.W. 3287 (Oct.

18, 1993) (No. 93-284). Respondent agrees with Petitioner that this Court should grant *certiorari* in this case, but stay all briefing until the Court issues its opinion in *Security Services, Inc. v. K Mart* scheduled for oral argument on February 28, 1994.

CONCLUSION

For the foregoing reasons, the Petition of Silvey should be granted and a Writ of Certiorari issued to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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